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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates	)	MM Docket No. 95-92
47 C.F.R. § 73.658(a), (b), (d), (e) and (g)	)	DOCKET FILE COPY ORIGINAL

To: The Commission

<u>Reply Comments of Southern Broadcast Corporation of Sarasota</u>

Southern Broadcast Corporation of Sarasota ("SBC") hereby replies to comments filed in this proceeding proposing the elimination or modification of Rule 73.658(b), the Network Territorial Exclusivity Rule. [1] No party has filed comments demonstrating that it, or any other person, has been harmed by the Network Territorial Exclusivity Rule. No party seeking the rule's repeal or modification has discussed how its use of additional exclusivity, above and beyond that presently allowed, will serve the public interest, convenience or necessity. Indeed no party has explained how restricting the ability of stations in smaller communities to compete for access to network programs serves any useful purpose, public or private, apart from maximizing the profits of the group owners who control the VHF network affiliates in the largest cities.

[1] The only parties proposing the rule's elimination are National Broadcasting Company, Inc. and Capital Cities/ABC, Inc. Parties proposing modification of the rule are New World Television, Inc., The Network Affiliated Stations Alliance, The Association of Independent Television Stations, Inc., The Warner Bros. Television Network, Blade Communications, Inc., Cosmos Broadcasting Corporation, et al, The New York Times Company, and Thomas Smith. Retention of the rule was advocated by CBS, Inc. Pappas Stations Partnership, Brechner Management Company and Great Trails Broadcasting Corp.

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Actually SBC agrees with a number of observations made by parties advocating repeal or modification of the Network Territorial Exclusivity Rule. ABC is correct in its observation that increased network competition for broadcast outlets and greater group ownership of those outlets has shifted bargaining power from networks to affiliates.[2] ABC fails to mention, however, that this power shift is primarily toward group owners having VHF outlets in the largest communities.[3] These are the broadcast outlets for which the networks are competing. ABC is also correct in identifying an affiliate's superior local news performance as a benefit to its network[4] and in postulating that networks have a primary interest in the broadest circulation possible.[5] However, ABC neglects to note that it has negotiated at least one multi-community affiliation agreement where it disaffiliated the number one ranked news station in a smaller community to protect its network coverage in two larger communities.[6] In other words, ABC has maintained "the broadest circulation possible" in the largest cities at the expense of viewers in smaller communities.[7]

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[2] Comments of Capital Cities/ABC, Inc. at pp. 5-6.

[3] In fact, perusal of the ownership data reported in the 1995 Broadcasting and Cable Yearbook for VHF stations in the first fifteen television DMAs shows only one VHF station that is not owned by a group owner. That station, KCAL, Los Angeles, is owned by Disney. Disney, of course, is in the process of acquiring Capital Cities/ABC, Inc.

[4] Comments of Capital Cities/ABC, Inc. at p. 8.

[5] Id at p. 31.

[6] In mid-1994 ABC and Scripps Howard Broadcasting Company negotiated a multi-station affiliation agreement covering Scripps' stations in Detroit, Cleveland, Tampa, Phoenix and Baltimore. To accommodate Scripps' demand for an affiliation for its Phoenix UHF station, ABC terminated its affiliation with Station KTVK, Channel 3, Phoenix. At the time, Station KTVK was the top rated station in the Phoenix market in network dayparts, in syndicated programs and in local news. See Further Declaration of William Miller appended hereto.

[7] This is hardly surprising. The distribution of television households throughout the 211 television DMAs is skewed heavily in favor of the top DMAs. DMA Number 1, New York, has more television households than the combined number of television households in DMAs numbers 136

SBC agrees with Cosmos Broadcasting Corporation and Blade Communications, Inc. that intense local competition makes network affiliation a critical factor in a station's ability to optimize local programming service and that local stations' need for a network affiliation has not changed.[8]

NBC is correct when it notes that the Network Territorial Exclusivity Rule, in practice, has not had a significant impact on network affiliate relations.[9] The rule is one that governs competition among affiliates inter se. The rule leaves networks free to give their affiliates de facto exclusivity beyond their communities of license.[10]

Some of the factual assertions in comments seeking repeal or modification of the Network Territorial Exclusivity Rule are sufficiently erroneous to warrant mention. ABC is simply wrong when it suggests that it seeks to affiliate with the strongest station in each market.[11] ABC has affiliated with weaker UHF stations in smaller communities to preserve access to a group owner's VHF stations in larger communities.[12] This significant deviation from past network practices arose

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through 211. If one top DMA is as important as seventy-six smaller DMAs, are coverage considerations in smaller DMAs likely to influence network decision-making when top market affiliations are at stake? Networks sell national advertising. They need national circulation numbers. The loss of network viewers in a small community is virtually meaningless from a national advertising perspective. From the perspective of persons losing free, over-the-air, network service, however, loss of a local affiliate is a significant hardship.

[8] Comments of Cosmos Broadcasting Corporation et al at p. 4; and Comments of Blade Communications, Inc. at p. 5.

[9] Comments of National Broadcasting Company, Inc. at p. 45.

[10] Id at p. 44.

[11] Comments of Capital Cities/ABC, Inc. at p. 7.

[12] In its multi-station affiliation arrangement with Scripps Howard, ABC terminated affiliations with VHF television stations in St. Petersburg and Phoenix to affiliate with Scripps' UHF stations in Tampa and Phoenix. This was done to preserve ABC's access to Scripps' VHF stations in Detroit and Cleveland, not to obtain the strongest affiliates in Tampa and Phoenix.

when ABC conducted at least some of its affiliation negotiations on a multi-community package basis. This precluded the type of market-by-market search for excellence suggested in ABC's comments.[13]

ABC is also incorrect when it postulates that "Group owned stations tend to be the strongest stations because they generally have superior resources to devote to local news and community service which translates into commercial success."[14] Group-owned stations that do not have network affiliations do not devote significant resources to news and community service.[15] It is affiliation with a major network, and not group ownership, that provides stations the resources for news and community service. For example, ABC's new affiliates in Tampa and Phoenix are both owned by a group owner. Neither affiliate had any meaningful local news presence prior to affiliating with ABC. It was their ABC affiliations, and not their group ownership, that prompted ABC's new Phoenix and Tampa affiliates to develop local news operations.

The present version of the Network Territorial Exclusivity Rule was adopted to foster local television service by providing television stations in smaller communities an opportunity to compete for network affiliations. See Revision of Territorial Exclusivity Rule, 12 RR 15 37 (1955). None of

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[13] SBC relates these facts solely for evaluation in the FCC's quasi-legislative prospective rulemaking process. SBC does not seek to re-litigate any issue raised in its previous filings against Capital Cities/ABC, Inc. or Scripps Howard Broadcasting Company and therefore does not intend these comments to be construed as a complaint against either ABC or Scripps. Nor does it seek any claim or adjudication against ABC or Scripps or anyone else with respect to these matters. In SBC's opinion, taking into account the Settlement Agreement, the record raises no substantial and material question that would require or warrant further inquiry into whether ABC or Scripps entered into a contract, agreement or understanding in violation of the Network Territorial Exclusivity Rule or whether ABC, Capital Cities/ABC or Scripps is qualified to hold broadcast licenses or control broadcast licenses.

[14] Comments of Capital Cities/ABC, Inc. at p. 7.

[15] This observation applies with almost equal force to group owned stations that are affiliates of the Fox, UPN, and Warner Brothers networks. The only networks whose affiliates consistently maintain significant local news operations are ABC, NBC, and CBS.

the commenters proposing to repeal or modify the rule has commented on the importance of local television or the usefulness of access to network affiliations in fostering local television. Those seeking to modify the rule have, instead, made assertions to the effect that a television station's community of license does not define its broadcast market. This, of course, misses the entire point of the rule.

SBC submits that the public interest is better served if the focus of Network Territorial Exclusivity Rules remains on community of license. Broadcast stations are licensed to provide primary transmission service to communities, not to ADIs, DMAs, markets or 35 mile zones.[16] Access to network programming is a critical asset that materially aids stations in serving their principal communities with local news and public service programs. Changing the Network Territorial Exclusivity Rule in a manner that reduces access to network programs can only harm local television transmission service in affected communities.

Some commenters suggest that stations should be allowed to bargain for network territorial exclusivity within their Designated Market Areas (DMAs). SBC submits that this arrangement will certainly bar stations located in smaller communities within a DMA from access to network programs. This will occur with no corresponding benefit to the public. As CBS, Inc. observed in its comments:

> Although it is quite unusual for a network to have more than one affiliate within the same DMA, this does occur in certain geographically large markets where a network would be unable to

[16] Imagine the outcry from large city television stations if the Commission started licensing television stations to DMAs, instead of to communities. How many of the 23 New York DMA stations would want to move to Manhattan? Wouldn't the 24 Los Angeles DMA stations all seek antenna sites on Mt. Wilson? Since stations are, in fact, required by statute to be distributed among the several communities and states, isn't it appropriate that they have an opportunity to compete for the network programs that can support local news and community programming serving those communities and states? The Commission's licensing scheme is community based and the Network Territorial Exclusivity Rule should continue to reflect this statutory design.

> reach a significant number of homes with over-the-air service if it had only a single affiliate. In such situations, the public interest would not be served by allowing a station in the market's dominant city to preclude its network from affiliating with a station licensed to a community at the margins of its own service area, thereby depriving a substantial number of non-cable subscribers of the network's programming.[17]

The fact is that one or two stations in a smaller community (or even a larger community) on the outskirts of a DMA cannot attract the kind of viewership that will permit the creation of a new DMA. To establish a new DMA (and thus preserve the right to bargain for network programs) stations in a community "must achieve a combined share of audience greater than the combined share of audience of the commercial stations assigned to any outside DMA area..."[18] By way of illustration, assume that a station on the fringe of a DMA is located in a county having two licensed television stations. Assume further that the central counties of the DMA contain communities with six licensed television stations. For the fringe county to to qualify to become a separate DMA, its two television stations must draw a combined viewing audience in their home county greater than the combined viewing audience of the six stations from the central counties. The two fringe county stations must out-perform the central county stations better than 3 to 1 in the home county to achieve this result. Further, if the fringe county receives its network programs from stations located outside the county, the fringe county cannot qualify to be a separate DMA, unless large numbers of local viewers stop watching network television. This creates a situation where smaller community stations can only bargain for network programs if local viewers do not want to view network programs. How

[17] Comments of CBS, Inc. at pp. 37-38.

[18] Even then, Nielsen can refuse to create a new DMA if it determines there is insufficient financial support for Nielsen's services in the new DMA. See Comments of Southern Broadcast Corporation of Sarasota at Exhibit 2.

does this serve the public interest?

A number of commenters advocating a DMA based standard for network territorial exclusivity seek to provide some relief to existing affiliates in DMAs where networks have affiliated with more than one station. They suggest that existing affiliation agreements be grandfathered in those DMAs. This is not a workable approach to the exclusivity problem, however, because exclusivity demands will only be deferred until expiration of the existing affiliation agreements. At that time the larger community station will bargain with the network for exclusivity against the station in the smaller community and the financial support for the smaller community's local television outlet will evaporate. Moreover, grandfathering existing two-affiliate DMAs does nothing to promote the additional support for local television service that could be available if networks were free to affiliate with more stations in smaller communities.

SBC recognizes that many aspects of the television business have changed since the Commission adopted the current version of the Network Territorial Exclusivity Rule. Those changes have, however, made retention and even strengthening of the rule more important than ever. Television broadcasting is not a business that can be pursued in the absence of government regulation. Without government limitations on the frequency, location, power and height above average terrain of stations, over-the-air television would not exist. The government and the government alone gives television group owners the right to operate their VHF television stations in the largest communities in this country. Reasonable limits must be set on the power of these television group owners to demand territorial exclusivity for network programs if local television broadcast outlets are to adequately serve viewers in smaller communities in outlying areas. The present Network Exclusivity Rule is an extremely limited restraint on the power of television owners in larger communities to deny network programs to stations in outlying regions. It should be retained and strengthened to foster local television outlets in smaller communities. These local stations are the only television stations with the incentive to provide local news and community service programs to viewers in smaller communities.

Respectfully submitted,

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FURTHER DECLARATION OF WILLIAM MILLER

I, WILLIAM MILLER, hereby declare under penalty of perjury as follows:

1. In the separate "DECLARATION OF WILLIAM MILLER" which I have signed this day I have detailed the events of which I have knowledge concerning ABC's decision to terminate our network affiliation and affiliate instead with Scripps Howard's KNXV-TV. The purpose of this declaration is to state some of the facts relating to KTVK's position in the Phoenix market. The ratings and share data given below are all from Nielsen reports. ABC and Scripps Howard are, of course, fully aware of all Nielsen reports relating to the Phoenix market.

2. KTVK is the top-rated station in the Phoenix market. In network dayparts, as well as in syndicated programming and local news, KTVK dominates in household ratings and all key demographics (which in Phoenix are adults 18-49 and 25-54).

3. In the area of local news, KTVK has the largest broadcast news staff in Arizona. We program more than three hours of live news programming each day. In the early news race at 5:00 p.m. and 6:00 p.m., KTVK delivers more adults 18-49 and 25-54 than the other two stations programming news combined. For four years in a row, KTVK has had the number one newscast at 10:00 p.m., with over 20% more adults under the age of 55 than the other two news stations.

4. In the early fringe period (3:00 to 5:00 p.m.), when network affiliates broadcast syndicated programming, KTVK has invested in the most successful programming available in syndication today, licensing much of this product until the year 2000. "The Oprah Winfrey Show" and "Donahue" lead in to KTVK's late-afternoon local newscast and dominate in the early fringe daypart. "Oprah Winfrey" attracts an audience in key demographics that is three times greater than the audience of any other program in the time period. "Donahue" is number one in its time period also, delivering 50% more adults 18-54 at 4:00 p.m. than all the competition. Leading out of the early news block is "Entertainment Tonight," again the top program in all key demographics. During the morning syndication period, KTVK broadcasts "The Sally Jessy Raphael Show," number one in its time period. In late night, KTVK presents "Hard Copy," one of the top magazine shows available in syndication.

5. In network programming, KTVK regularly outpaces the national average. I presume this is what Tom Murphy had in mind when he told me that KTVK was one of the best ABC affiliates. KTVK is number one with ABC's "Good Morning America" from 7:00 to 9:00 a.m., doubling all demographic competition in that daypart. KTVK is also number one in the network "soap opera" period from noon to 3:00 p.m. And KTVK is also number one in prime time (7:00 to 10:00 p.m.), beating the competition in households and every adult demographic from Men and Women 18-49 to Men and Women 50+.

6. KTVK's strength goes beyond regular and series programming. An example is NFL pre-season football. This is the year when NFL regular season programming is switching to Fox. In the premiere Fox network preseason telecast of the NFL on KNXV-TV, the program earned a 5.5 rating and an 11 share. Five days earlier in the exact same time period, the NFL pre-season game on KTVK earned a 10.5 rating and a 19 share. In other words, KTVK delivered 42% more audience.

7. Further comparison of KNXV-TV and KTVK by daypart illustrates the dramatic difference in station performance. In the mornings from 6:00 to 9:00 a.m., KTVK delivers two and one-half times the audience delivered by KNXV-TV. From 9:00 a.m. to noon and noon to 3:00 p.m., KTVK's audience is almost triple that of KNXV-TV. In early fringe (3:00 to 5:00 p.m.), KTVK doubles KNXV-TV in homes and is four to five times stronger in demographics. And in the late night programming, KTVK delivers three times the audience of KNXV-TV.

8. Overall, from sign-on to sign-off, KTVK is the number one station in Phoenix, with twice the audience of KNXV-TV, which ranks fourth in this six-station market.

The foregoing statements are true and correct to the best of my knowledge and belief.

William Miller

WILLIAM MILLER

August 19, 1994